

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

|                     |   |                           |
|---------------------|---|---------------------------|
| GARY C. TANNER,     | ) | CASE NO.: C07-0713-JCC    |
|                     | ) |                           |
| Plaintiff,          | ) |                           |
|                     | ) |                           |
| v.                  | ) | REPORT AND RECOMMENDATION |
|                     | ) |                           |
| DR. KENNEY, et al., | ) |                           |
|                     | ) |                           |
| Defendants.         | ) |                           |
| _____               | ) |                           |

INTRODUCTION

Plaintiff proceeds *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 action. He is an inmate incarcerated at the Monroe Correctional Complex (MCC) in Monroe, Washington. In his amended complaint, plaintiff avers violation of his constitutional rights through the denial of treatment to address his chronic back pain, including a failure to take x-rays of his back, sporadic and inadequate treatment, and denial of pain relief. (Dkt. 18.) Plaintiff names Superintendent Kenneth Quinn, former Health Care Manager II Douglas Kollasch, David Kenney, M.D., and Advanced Registered Nurse Practitioner Sheryl Allbert as defendants.<sup>1</sup> He seeks declaratory, injunctive, and monetary relief.

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<sup>1</sup> Three previously named defendants were dismissed from this matter. (Dkts. 24 & 36.)

01 Defendants moved for summary judgment (Dkt. 37) and plaintiff failed to respond. The  
02 Court deems plaintiff's failure to oppose the dispositive motion to be an admission that  
03 defendant's motion has merit. *See* Local Civil Rule 7(b)(2). The Court further finds, having  
04 considered the papers and pleadings submitted by defendants, as well as the balance of the record  
05 in this matter, that defendant's motion for summary judgment should be granted and this case be  
06 dismissed against all named defendants.

#### 07 BACKGROUND

08 Plaintiff resides in the Special Offender Unit (SOU) at MCC. (Dkt. 37, Ex. 2 (Allbert  
09 Decl.), ¶ 3.) The SOU houses offenders designated as seriously mentally ill. (*Id.*)

10 Plaintiff suffered a variety of injuries prior to his incarceration, including injuries sustained  
11 in two falls from trees during his career as a commercial tree trimmer and a fall off a cliff. (*Id.*, Ex.  
12 5 (Holland Decl.), Attach. A (Excerpts of Tanner Deposition) at 15-24, 41.) Plaintiff also attests  
13 to a variety of other injuries, health problems, and a long-standing history of mental illness. (*Id.*  
14 at 17, 24-26, 31-36, 41.)

15 During his incarceration in the DOC, plaintiff has received treatment for mental health  
16 issues, chronic back pain, an ankle injury, asthma, high blood pressure, gastroesophageal reflux  
17 disease, hypertriglyceridemia, and Type II diabetes. (*Id.*, Ex. 2 and Ex. 5, Attach. A.) Defendant  
18 Allbert has provided primary medical care for plaintiff since April 2005. (*Id.*, Ex. 2, ¶ 3.)

19 Until November 2007, defendant Kollasch served in a position of administrative oversight  
20 of clinical delivery of medical care for inmates, including plaintiff. (*Id.*, Ex. 3 (Kollasch Decl.), ¶  
21 2.) Kollasch received and responded to four pieces of correspondence from plaintiff concerning  
22 his medical care. (*Id.*, Ex. 3, ¶ 3 and Attachs. A-D.) Prior to each response, Kollasch reviewed

01 plaintiff's health care records and discussed the care provided with defendant Dr. Kenney, the then  
02 Medical Director of MCC. (*Id.*, Ex. 3, ¶ 3 and Ex. 4 (Kenney Decl.), ¶ 1.)<sup>2</sup>

03 On July 10, 2006, Dr. Kenney examined plaintiff to evaluate his complaints of chronic low  
04 back pain. (*Id.*, Ex. 4, ¶ 2.) Dr. Kenney attests that plaintiff complained of back and ankle pain  
05 and, on several occasions, stated that narcotic analgesics were the only type of medication that  
06 was helpful. (*Id.*) Dr. Kenney further reports that, on examination, he found no muscle weakness  
07 or atrophy in the lower limbs; no changes to soft or sharp touch, vibration, or position in the lower  
08 extremities; minimal limitation of active rotation about the trunk and no limitation when the trunk  
09 was actively moved; all other movements of the lumbar spine within normal limits; no exacerbation  
10 of symptoms with movement; provocative tests, reliable in cases of significant disc disease  
11 requiring surgical intervention, negative; and palpation of large muscle groups associated with  
12 lumbar spine movement revealing muscle spasm and tenderness in several groups corresponding  
13 to the origin of stated pain. (*Id.*) (*See also id.*, Ex. 2, ¶ 8 (Allbert asserts that plaintiff is able to  
14 carry out his activities of daily living without any problems and has a full range of motion in his  
15 back).) Dr. Kenney determined that plaintiff demonstrated no significant degenerative disc disease  
16 and found the cause of his back pain to be muscle spasm secondary to overall deconditioning.  
17 (*Id.*, Ex. 4, ¶ 3.) Dr. Kenney also concluded that plaintiff exhibited drug seeking behavior. (*Id.*)

18 Dr. Kenney recommended a treatment plan including a non-steroidal anti-inflammatory  
19 (NSAID) to treat the inflammation caused by muscle spasm and an evaluation by a physical  
20 therapist to assess plaintiff's needs and to teach him a daily exercise program. (*Id.*, ¶ 6.) He found

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21  
22 <sup>2</sup> Since October 2007, Dr. Kenney has served as Interim Health Care Manager II at MCC.  
(Dkt. 37, Ex. 4, ¶ 1.)

01 neither back surgery, nor a long-term course of narcotics indicated. (*Id.*, ¶¶ 8-9 and Ex. 2, ¶ 7.)  
02 However, Dr. Kenney prescribed a short course of narcotics to be taken prior to the physical  
03 therapy sessions and ordered ongoing evaluation and follow-up with Allbert to assess plaintiff's  
04 ankle pain. (*Id.*, Ex. 4, ¶¶ 6, 9.) Pursuant to Dr. Kenney's recommendations, plaintiff received  
05 a full course of physical therapy, a hot water bottle, an extra blanket for comfort, a muscle relaxer,  
06 Oxycodone before his physical therapy sessions, and Naproxen, a NSAID, for pain. (*Id.*, Ex. 2,  
07 ¶ 6.)

08 Later, when plaintiff was not responsive to initial management, lumbar spine x-rays were  
09 ordered to rule out another cause for his continued symptoms. (*Id.*, Ex. 4, ¶ 4.) Dr. Kenney  
10 attests that the x-rays revealed no degenerative changes or any other pathology. (*Id.*)

11 Plaintiff also received treatment for his ankle, including x-rays after an ankle sprain injury,  
12 physical therapy, and a brace. (*Id.*, Ex. 2, ¶ 9.) Allbert attests that the X-rays were normal and  
13 that plaintiff was found to have full range of motion in his foot and ankle, and to walk without a  
14 limp. (*Id.*) However, MCC continues to provide a brace for support and comfort. (*Id.*)

15 On September 26, 2007, Allbert took plaintiff's request for long-term narcotic analgesia  
16 to the MCC Care Review Committee. (*Id.*, Ex. 2, ¶ 7.) Based on the conclusion that narcotics  
17 are not indicated for long-term treatment of chronic pain due to the high potential for physical and  
18 psychological dependence, the request was deemed not medically necessary and denied. (*Id.*)

19 Plaintiff continues to receive medications and treatment for his medical conditions. In  
20 particular, he receives blood pressure and blood sugar monitoring; a special diet; pulmonary  
21 function testing; Metformin to manage diabetes; Albuteral for asthma; Benazepril for high blood  
22 pressure; Hydrochlorothiazide, a diuretic; Robaxin, a muscle relaxer; Naproxen; and Simvastatin

01 to prevent heart disease. (*Id.*, Ex. 2, ¶ 5.)

02 DISCUSSION

03 Summary judgment is appropriate when “the pleadings, depositions, answers to  
04 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
05 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter  
06 of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving  
07 party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
08 showing on an essential element of his case with respect to which he has the burden of proof.  
09 *Celotex*, 477 U.S. at 322-23. The court must draw all reasonable inferences in favor of the non-  
10 moving party. *See F.D.I.C. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev’d*  
11 *on other grounds*, 512 U.S. 79 (1994).

12 Plaintiff here avers claims pursuant to 42 U.S.C. § 1983. In order to sustain a § 1983  
13 claim, plaintiff must show (1) that he suffered a violation of rights protected by the Constitution  
14 or created by federal statute, and (2) that the violation was proximately caused by a person acting  
15 under color of state or federal law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Crumpton v. Gates*,  
16 947 F.2d 1418, 1420 (9th Cir. 1991).

17 Plaintiff alleges a violation of his Eighth Amendment rights. As reflected above, he  
18 specifically contends denial of treatment for his chronic back pain, including a failure to take x-rays  
19 of his back, sporadic and inadequate treatment, and denial of pain relief. However, for the reasons  
20 described below, the undersigned finds plaintiff’s claims subject to dismissal on summary  
21 judgment.

22 ///

01 A. Failure to Allege Personal Participation

02 To obtain § 1983 relief, plaintiff must show how individually named defendants caused  
03 or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d  
04 1350, 1355 (9th Cir. 1981). A plaintiff may not hold supervisory personnel liable under § 1983  
05 for constitutional deprivations under a theory of supervisory liability. *Taylor v. List*, 880 F.2d  
06 1040, 1045 (9th Cir. 1989). Rather, a plaintiff must allege that a defendant's own conduct  
07 violated the plaintiff's civil rights. Also, defendants acting in their official capacity are not  
08 considered a "person" for purposes of a § 1983 damages claim. *Arizonans for Official English*  
09 *v. Arizona*, 520 U.S. 43, 69 n.24 (1997).

10 Defendants maintain that plaintiff improperly included defendants Quinn, Kollasch, and Dr.  
11 Kenney in this lawsuit solely due to their supervisory and official capacities. They point to  
12 plaintiff's deposition testimony in support. Plaintiff testified, with respect to these defendants:

13 Ken Quinn, yeah. He's the superintendent or something. I mentioned those people's  
14 names because I think they're the ones that hired Sheryl Albert. That's the only  
15 reason I mentioned Kollasch and Doug, Dough Kollasch and Kenney and Sherryl  
16 Albert is because I think Ken Quinn give him a job. He should be responsible. . . .

17 . . .

18 Well, yeah, I believe [Quinn] hired [Allbert] to do what she's doing, and she's  
19 working under Ken Quinn and Kenney. . . .

20 . . .

21 Yeah, yeah. That may be wrong. They haven't done anything to me, but I did get a  
22 letter from Ken Quinn stating that he would change my health provider when me and  
Sheryl were getting at it. . . .

23 . . .

24 Yeah, [Quinn] is more or less I think [included just because he was the boss]. . . .

01 . . .

02 . . . I just wanted the people that I think is responsible for Sheryl Albert's acts. . . .

03 . . .

04 I believe [Kollash is listed because he's kind of a supervisory person, too]. I believe  
05 he's a medical supervisor or a medical manager . . . , and I think she's working under  
one of these guys. . . .

06 . . .

07 I believe [Dr. Kenney's] the supervisor of Doug, and he tells Sheryl what to do.

08 . . .

09 Dr. Kenney tells Doug how it should be, and then they tell Sheryl Albert, hey, you can  
10 only do this . . . .

11 . . .

12 You know, I don't know [Dr. Kenney from Kollasch], okay? I don't. I don't know  
one from the other, but I know they're both high up there in rank as far as medical  
13 procedures go. And so I'm getting them both. I'm putting them both in a grievance.  
I mean, I've wrote plenty of grievances, but they're way past the third level, you  
14 know.

15 (Dkt. 37, Ex. 5, Attach. A at 54-57, 70, 75.) Defendants argue that, given this testimony,  
16 plaintiff's claims against Quinn, Kollasch, and Dr. Kenney should be dismissed.

17 Defendants' argument with respect to Quinn and Kollasch is well taken. It is apparent  
18 from plaintiff's testimony that he improperly seeks to hold Quinn and Kollasch liable under a  
19 theory of supervisory liability. Such a claim may not stand and plaintiff's claims against these  
20 defendants should, therefore, be dismissed.

21 It is less clear whether plaintiff's claims against Dr. Kenney should be dismissed on this  
22 basis. Although plaintiff was clearly confused during his deposition as to the respective identities

01 of Dr. Kenney and Kollasch, it is apparent from defendant's own summary judgment filing that Dr.  
02 Kenney played a direct role in plaintiff's treatment, or the alleged lack thereof. Accordingly,  
03 giving plaintiff the benefit of the doubt, the undersigned declines to recommend dismissal of  
04 plaintiff's claims against Dr. Kenney based on a failure to allege personal participation.

05 B. Eighth Amendment Claim

06 The Eighth Amendment prohibits the infliction of cruel and unusual punishment on one  
07 convicted of a crime. U.S. Const. amend. VIII. To establish an Eighth Amendment violation, an  
08 inmate must prove that prison officials were "deliberately indifferent" to a serious risk of harm to  
09 his well-being. *Wilson v. Seiter*, 501 U.S. 294, 302-04 (1991); *Estelle v. Gamble*, 429 U.S. 97,  
10 104 (1976). A prison official may be held liable "only if he knows that inmates face a substantial  
11 risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."  
12 *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). An inmate must demonstrate that the risk of harm  
13 was "objectively, 'sufficiently serious,'" and that the officials acted with a "'sufficiently culpable  
14 state of mind.'" *Id.* at 834 (cited sources omitted). The latter subjective showing requires plaintiff  
15 to prove (1) that an official was aware of facts from which he could have inferred that a substantial  
16 risk of serious harm existed, and (2) that the official in fact drew the inference. *See Wallis v.*  
17 *Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995) (citing *Farmer*, 511 U.S. at 837).

18 With a claim of alleged medical mistreatment, an inmate must allege "acts or omissions  
19 sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429  
20 U.S. at 106. Deliberate indifference may be found where prison officials "deny, delay or  
21 intentionally interfere with medical treatment, or it may be shown by the way in which prison  
22 physicians provide medical care." *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir.



01 1988). The indifference, however, must be substantial; inadequate treatment due to negligence,  
02 inadvertence or differences in judgment between an inmate and medical personnel do not rise to  
03 the level of a constitutional violation. *See id.*; *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).  
04 Prison officials may be free from liability if they “responded reasonably” to a known risk; a  
05 dispute, in hindsight, over the existence of arguably superior alternatives does not raise a triable  
06 issue of fact as to whether the defendants were deliberately indifferent. *See Farmer*, 511 U.S. at  
07 844; *Berg v. Kincheloe*, 794 F.2d 457, 462 (9th Cir. 1986).

08 Defendants argue that plaintiff fails to satisfy either the objective or subjective components  
09 of an Eighth Amendment claim. The Court agrees with defendants for the reasons described  
10 below.

11 Defendants provide support for the assertion that physical examination and x-rays of  
12 plaintiff did not yield any objective signs of significant degenerative changes to plaintiff’s back, and  
13 that plaintiff’s medical providers prescribed a variety of measures to treat an assessed muscle  
14 spasm secondary to lack of physical activity, including physical therapy accompanied by narcotic  
15 medication, non-narcotic pain relief medication, a hot water bottle, an extra blanket, and a muscle  
16 relaxer. (Dkt. 37, Exs. 2 & 4.) Plaintiff also received treatment for an ankle injury and other  
17 medical conditions. (*Id.*) A request for ongoing narcotic treatment was considered but rejected  
18 as not indicated for long-term treatment of chronic pain. (*Id.* and Ex. 3, Attach. D.)

19 Plaintiff does not show the necessity of some other course of treatment. Although  
20 contending that no x-rays had been taken at the time of his Amended Complaint, plaintiff fails to  
21 contradict defendant’s assertion that x-rays were, at some point, taken and revealed normal  
22 findings. (*Id.*, Ex. 4, ¶ 4.) Also, while plaintiff finds the type of pain relief prescribed insufficient,

01 he offers no more than a difference of opinion as to the proper course of treatment, which does  
02 not give rise to a constitutional claim for deliberate indifference. *Sanchez*, 891 F.2d at 242.

03 Moreover, even if plaintiff had shown an objectively, sufficiently serious risk of harm, he  
04 fails to show defendants were aware of facts from which they could have inferred a substantial risk  
05 existed and that they, in fact, drew such an inference. *Wallis*, 70 F.3d at 1077. The care provided  
06 and the results of examinations and x-rays belies the contention that a reasonable person would  
07 have inferred a substantial risk of harm. Nor does plaintiff support a contention that defendants  
08 actually inferred or knowingly disregarded such a risk. Indeed, he did not respond to declarations  
09 from defendants to the contrary. (*See* Dkt. 37, Exs. 2 & 4.)

10 In sum, plaintiff fails to establish defendants were deliberately indifferent to a serious risk  
11 of harm to his well-being. As there is no basis for supporting plaintiff's Eighth Amendment claims,  
12 these claims are subject to dismissal on summary judgment.<sup>3</sup>

13 C. Injunctive Relief

14 Plaintiff requests both preliminary and permanent injunctive relief "ordering defendants to  
15 cease retaliation and succum [sic] to rule of law[.]" and "[t]o for bid [sic] transferring plaintiff to  
16 another prison where his mental illness cannot be addressed before treatment currently on going  
17 [sic] can continue." (Dkt. 18 at 5.) The Court previously considered and rejected plaintiff's  
18 request for preliminary injunctive relief. (*See* Dkts. 30 & 33.)

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21 <sup>3</sup> Because the Court finds plaintiff's claims subject to dismissal for the reasons stated  
22 above, it declines to address an additional argument that defendants are entitled to qualified  
immunity.

01 Plaintiff's request for permanent injunctive relief should likewise be denied. Plaintiff  
02 dropped his retaliation claim through the voluntary dismissal of his claims against former defendant  
03 Craig McIntyre. (*See* Dkt. 18 at 4, Dkt. 19, Exs. at 1, 3, and Dkt. 36.) Plaintiff's transfer claim  
04 is presumably tied to his Eighth Amendment claim, which fails for the reasons stated above.  
05 Moreover, a convicted prisoner does not have a right to be housed at a particular facility in a state  
06 prison system. *See Meachum v. Fano*, 427 U.S. 215, 224-25 (1976) ("The conviction has  
07 sufficiently extinguished the defendant's liberty interest to empower the State to confine him in  
08 any of its prisons."; "[T]he Due Process Clause in and of itself [does not] protect a duly convicted  
09 prisoner against transfer from one institution to another within the state prison system.") (emphasis  
10 in original). *But see Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) ("[P]rison officials [may  
11 not] transfer an inmate to another prison in retaliation for the inmate's exercise of his First  
12 Amendment right to pursue federal civil rights litigation.") In this case, plaintiff does not show,  
13 or even allege, the existence of any significant threat of a transfer. Instead, any such harm appears  
14 to be purely speculative and, consequently, insufficient to warrant the relief requested. Indeed,  
15 plaintiff has not been transferred since the initiation of this lawsuit in May 2007.

16 Injunctive relief should be granted "sparingly, and only in a clear and plain case." *Rizzo*  
17 *v. Goode*, 423 U.S. 362, 378 (1976) (quoted case omitted). Because there is no basis for  
18 plaintiff's injunctive relief request, this request is also subject to summary dismissal.

#### 19 CONCLUSION

20 For the reasons set forth above, the Court recommends that defendants' motion for  
21 summary judgment be GRANTED and that plaintiff's claims against all named defendants be

22 ///

DISMISSED. A proposed order accompanies this Report and Recommendation.

DATED this 4th day of April, 2008.

A handwritten signature in black ink, appearing to read 'Mary Alice Theiler', written over a horizontal line.

Mary Alice Theiler  
United States Magistrate Judge